

# **DOJ / FTC Hearings**

## **Innovation, Intellectual Property and Competition**

**Washington D.C.**  
**22 May 2002**

« The Technology Transfer Block Exemption »

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- What is the role of the block exemption ?
  - . linked to structure of EU competition law and obligatory notifications
  - . EU competition law : Article 81
    - a two-step approach
    - importance of Article 81 (3) exemptions
    - in principle, no exemption without notification
    - failure to notify has serious legal consequences

- block exemption regulations provide a means of benefiting from an exemption without having to notify agreements
- block exemption regulations adopted when Commission is satisfied that it has sufficient knowledge
- although not official purpose, block exemption regulations become a kind of « code of conduct » providing legal security

- The 1996 Regulation covers patent licences, know-how licences and mixed licences
- Commission wished to introduce a market-share « threshold » for extending the benefit of the exemption to certain territorial and other restrictions
- Backed down following representations from LES and other professional groups
- Therefore, in its present form, the Regulation provides legal security based essentially on the terms of the contract

- Regulation in force for 10 years but evaluation after 4 years of operation
- Commission proposal to abolish the notification system calls into question existing block exemption regulations
- DG Competition increasingly aware of, and influenced by, US approach to antitrust aspects of licensing

- Several aspects highlighted in Commission's evaluation document
  - . IP rights important factor in economic development
  - . Licensing is, in principle, pro-competitive
  - . In order to properly assess the likely competitive impact of a licence, it is important to know the structure of the relevant market – including market shares
  - . Provisions in licence agreements can have different impact according to whether the parties to the licence agreement are or are not competitors

## Commission's suggested solution

- licences between non-competitors
  - . restraints not related to exploitation of licensed IP subject to 30 % market share, but not including « hardcore » restrictions
  - . restraints related to exploitation of licensed IP subject to a dominance threshold
  - . but special provisions on :
    - territorial, field of use, customer restraints
    - hardcore list  
(pricing and some territorial restraints)
  - . objective : to ensure coherence with Regulation 2790/99 on vertical restraints

## Commission's suggested solution

- licenses between competitors
  - . Market share threshold of 25 %
  - . Hardcore list of restrictions
    - price fixing
    - limiting output or sales
    - allocating territories or customers
    - possible severability of certain types of restraints



This sounds « realistic » in the way that the US guidelines are meant to be realistic

**BUT**

The Block Exemption is not a set of guidelines explaining official policy

It represents conditions which businesses must absolutely satisfy to avoid individual notification

where

The burden of proof is essentially on business to justify a license and not on those attacking the license to justify their position

## NOTE :

The benefit of the block exemption is not absolute.

The Commission can in individual cases move to withdraw the benefit of the block exemption.

At that stage « realistic » guidelines to explain the Commission's policy could well be appropriate.

Because a Commission decision to withdraw the benefit of the block exemption, if challenged, puts the burden of proof on the Commission.

# What if the centralized notification system is abolished ?

- it gets rid of the « avoidance of notification » reason for a straightforward block exemption
- but the « burden of proof » reason for granting a straightforward « presumed » exemption will continue to exist
- the more so since the granting of exemption would be in the hands of a myriad of national authorities
- the presumed exemption would not be absolute and could be overturned

- as long as Article 81 retains its present structure and approach
  - . a « block » or presumed exemption based on « the contract, the whole contract and nothing but the contract »
  - . guidelines as to the basis on which the authorities would seek to overturn the presumed exemption
- on that basis we can discuss what should be in the « block » or « presumed » exemption and what should be in the guidelines